IN THE SUPREME COURT
OF FLORIDA

CASE NO. 96,629

INQUIRY CONCERNING A JUDGE NO. 99-09
RE: Patricia Kinsey

JUDICIAL QUALIFICATIONS COMMISSION'S SUPPLEMENTAL REPLY BRIEF

On Review of the
Findings, Conclusions and Recommendations by the
Hearing Panel of the Judicial Qualifications Commission

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PREFACE

Judge Kinsey's Response to this Court's Order to Show Cause dated October 30, 2000, will be hereinafter referred to as "Kinsey Response at _____." The JQC filed its initial "Reply Brief" in this matter on January 30, 2001. All references to the JQC's Reply Brief will be designated as "JQC Reply at _____."

The JQC filed its Initial Supplemental Brief on July 24, 2002. All references to the JQC's Initial Supplemental Brief will designated as "JQC Supplemental Brief at _____." Thereafter, Judge Kinsey filed her Supplemental Answer Brief on August 5, 2002. All references to Judge Kinsey's Supplemental Answer Brief will be referred to as "Answer Brief at _____."

ARGUMENT

I. THE *WHITE* DECISION DOES NOT IMPLICATE FLORIDA'S "PLEDGES OR PROMISES" CLAUSE IN CANON 7(A)(3)(D)(i)

Florida's version of the "pledges or promises" clause is embodied in Canon 7(A)(3)(d)(i). Judge Kinsey acknowledges in her Answer Brief that *White* did not invalidate the "pledges or promises" clause under Minnesota's Code of Judicial Conduct.[1] She also admits, albeit reluctantly, that "[t]here is possibly a compelling

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[1] As Justice Ginsburg noted in her dissent, "All parties to [*White*] agree that, whatever the validity of the Announce Clause, the State may constitutionally prohibit judicial candidates from pledging or promising certain results." *See* Slip Opinion at 11 (Ginsburg, J., dissenting).

state interest sufficient to allow prohibition of some form of pledges and promises." *See* Answer Brief at 3. She distinguishes her statements from "pledges or promises," however, by characterizing her remarks as "statements making voters aware of current problems, an incumbent's job performance, or a candidate's philosophical approach to . . . problems." *Id.*[2] As demonstrated below, Respondent's post-hoc characterization of her campaign statements as general philosophical commentary is indicative of her attempt throughout this proceeding to rely on semantical sophistry rather than accept responsibility for her campaign statements.

In analyzing whether the Hearing Panel properly concluded that Respondent's campaign statements properly fall within the rubric of "pledges or promises," this Court's decision in *In re McMillan*, 797 So. 2d 560 (Fla. 2001) is instructive.[3] At issue in *McMillan*, *inter alia*, was whether the JQC properly found that statements made by Matthew McMillan, a judicial candidate in Manatee County, violated the "pledges or promises" clause of the Florida Code of Judicial Conduct. Several of the statements under scrutiny in *McMillan* were predicated on the following charge:

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[2] As elaborated upon in the JQC's Initial Supplemental Brief, the Hearing Panel found Judge Kinsey guilty of violating Florida's "pledges or promises" clause in Charge Nos. 1, 2, 3, 4, and 5. *See* JQC Supplemental Brief at 8-16.

[3] This court rendered its decision in *McMillan* on August 16, 2001, which was after initial briefs were filed in this case.

> During the campaign, in violation of Canon 1, Canon 2(A), Canon 3(b)(5), Canon 7(A)(3)(a), and Canons 7(A)(3)(d)(i) - (iii), you distributed a piece of campaign literature entitled, "*A Fellow Police Office Speaks Out*," in which you stated that "Judge Brown has never been a friend to law enforcement in the Courtroom," and further invited law enforcement officers to "imagine a judge who [would] go to bat for [them]." In that same literature, you also stated that law enforcement officers had the opportunity to "support a fellow police officer who has been there and [would] go to bat" for them as opposed to simply pledging or promising the faithful and impartial performance of your duties in office.

McMillan, 797 So. 2d at 562. In upholding the JQC's determination that the aforementioned statements (referred to as the "police officer letter" by this Court) violated Florida's "pledges or promises" clause, this Court reasoned as follows:

> On their face, the statements contained in this material appear obviously intended to send a clear message that should he become a judge, Judge McMillan would be partial to law enforcement and the State. The Code of Judicial Conduct is clear and unambiguous as to its proscription against both judges and judicial candidates making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." . . . We note that at the proceedings, Judge McMillan testified that he read and understood the code before he began his campaign.

McMillan, 797 So. 2d at 566.

Similar to Judge McMillan, Judge Kinsey also testified that she read and understood the requirements of the Code of Judicial Conduct when she qualified as

a candidate. (T:1-74). Notwithstanding her belated attempt to excuse her pledges on the basis that she was simply providing voters with information they "could use to evaluate the two candidates and decide which would be the better judge," *see* Answer Brief at 7, there is no question that her intention, just as this Court found in *McMillan*, was to create and convey the message that, if elected, she "would be partial to law enforcement and the State." *McMillan*, 797 So. 2d at 566. Certainly, the fact that Respondent may have been more cunning in her approach does not lessen the pernicious effect of her pledges.[4]

For instance, instead of overtly informing voters that she would go "to bat" for law enforcement, as Judge McMillan did, she *de facto* conveyed the same message through the use of a group photo of herself with ten members of the police department beneath the legend:

Who do these guys count on to back them up?

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[4] Respondent's reliance on *In the Matter of Honorable Elizabeth Shanley*, SCJC No. 83 (July 1, 2002) is unavailing. First and foremost, *Shanley* was decided without reliance upon or reference to *White*. That case holds no more than that the New York Disciplinary Commission did not demonstrate that the phrase "Law and Order Candidate" "carries a representation that compromises judicial impartiality" since the phrase is "widely and indiscriminately used in everyday parlance and election campaigns." *See* Slip Opinion at 4. Thus, the court refused to consider the phrase a pledge or promise of conduct in office. In contrast to *Shanley*, the Hearing Panel found that Respondent made much more specific declarations of her bias toward law enforcement and the prosecution side of cases.

followed by the statement that:

> ***your police officers expect judges*** to take their testimony seriously and ***to help law enforcement*** by putting criminals where they belong . . . behind bars!

(emphasis added).[5]

A common theme running through both the Kinsey and McMillan campaigns were the challengers' attempts to portray the incumbent judges as hostile towards law enforcement and the state/prosecution side of cases. For example, in Judge McMillan's "police officer letter" which this Court held violated the "pledges or promises" clause, Judge McMillan attempted to inflame readers by stating that:

> Street officers are unhappy with my opponent. You have told me that Judge Brown has never been a friend to law enforcement in the Courtroom.

McMillan, 797 So. 2d at 566. Likewise, on a separate charge against Judge McMillan, this Court found him guilty of violating the "pledges or promises" clause for stating

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[5] The brochure in which the photograph appeared is the subject of JQC Charge No. 1 and is discussed in greater detail in the JQC's Supplemental Brief. *See* JQC Supplemental Brief at 8-10. *See also* Tab 1 to the JQC's Supplemental Brief.

Judge Lacey Collier, United States District Judge for the Northern District of Florida, testified that Respondent's statement that "police officers expect judges to take their testimony seriously and to help law enforcement by putting criminals behind bars" has a deleterious effect on the public's perception of the judiciary because it suggests that "the court is a tool of law enforcement." (T: 2-176-77).

he would "***always have the heart of a prosecutor***" and promising that he would not "rubber stamp" deals reached between prosecutors and defense attorneys and that he "***anticipated defense attorneys would not be happy with [him] as judge***." *McMillan*, 797 So. 2d at 563 & 566 (emphasis added).

When compared to Respondent's campaign statements in which she attempted to distinguish herself from the incumbent, William Green, it is equally clear that Judge Kinsey followed the same model as Judge McMillan. For example, Charge No. 4 considered by the Hearing Panel stems from the following comments Respondent made during a call-in radio show on which both she and the incumbent appeared:

> Pat Kinsey: ***As a prosecutor, I am different from a defense attorney***. I am trained, and I am ethically obliged to look at a case, after an arrest has been made and make a determination, what is just? What is fair? What are the appropriate charges? . . . ***This is something that is much different from what a defense attorney does. Much like Bill Green before he went on the bench, he was a defense attorney, that type of attorney. He is trained, and he is with [sic] ethically obliged at that time to zealously advocate for his client. That is, do whatever he could, under the law, to get his client free. And that is why I think we have such a philosophical difference, between us. I think, in my opinion, that Judge Green is still in that defense mode***.

See Tab 4 to JQC Supplemental Brief at p. 11 (emphasis added).

Finding that this statement was consistent with her attempt to inform voters of her bias towards law enforcement, the Hearing Panel reasoned:

> ***[T]here is simply no question as to Judge Kinsey's intentions to portray herself as pro-law enforcement***. When the caller on the radio show stated that he knew she was "pro-law enforcement," he followed up with a question as to whether this constituted bias toward the defense. Judge Kinsey answered by portraying herself as a prosecutor and portraying her opponent as a defense attorney with Judge Green still in the defense mode. ***The Panel finds that Judge Kinsey's statements did leave the firm and definite impression that even as a judge she would remain in the "prosecution mode." She intentionally contrasted herself, painting Judge Green in the defense mode and herself in the prosecution mode***.

See Findings at 23 (emphasis added).

Viewed objectively, there is little doubt that the thematic objective of the Kinsey campaign was built on precisely the type of foundation this court condemned in *McMillan*; namely, sending a message that the candidate, if elected, would be partial to law enforcement and the State. *McMillan*, 797 So. 2d at 566. The Hearing Panel found as much when it noted that "Judge Kinsey generally testified that she presented herself as favoring law enforcement because that became the issue in the race due to Judge Green's job performance which was generally condemned by law enforcement." *See* Findings at 13. Judge Kinsey herself admitted that judicial candidates do "not

have complete freedom" to speak their minds with regard to the conduct of their office. (T:1-75). Thus, her promises to assist law enforcement were not a by-product of ignorance but, rather, a carefully conceived plan to convey a message she believed would inflame voters against the incumbent.

II. THE *WHITE* DECISION HAS NO BEARING ON THE HEARING PANEL'S FINDING THAT JUDGE KINSEY MADE A KNOWING MISREPRESENTATION REGARDING HER OPPONENT IN VIOLATION OF CANON 7(A)(3)(d)(iii) AS TO CHARGE NOS. 7 AND 9

As explained in further detail in the JQC's Reply Brief and Initial Supplemental Brief, Charge No. 7 against Respondent was based on a brochure disseminated by the Kinsey campaign entitled, "*A Shocking Story of Judicial Abuse*" in which Respondent criticized Judge Green's handling of the criminal case of a defendant (Grover Heller) by giving voters the misleading impression that Judge Green had failed to revoke Heller's bond when, in fact, Judge Green had revoked the bond.[6] *See* JQC's Reply at 20-23. The Hearing Panel found, by clear and convincing evidence, that Respondent made a knowing misrepresentation concerning Mr. Heller's bond. *See* Findings at 27; *see also* (T:1-121-124).

[6] This charge is discussed in further detail in the JQC's Reply at pp. 20-23 and the JQC's Supplemental Brief at 16-18. *See also* Tab 6 to the JQC's Supplemental Brief.

With respect to Charge No. 9, the Hearing Panel found that Respondent made a knowing misrepresentation concerning the nature of the charges that were pending against a defendant named Charles Johnson in a campaign brochure entitled, "*A Vital Message From Law Enforcement,*" "because the brochure left the clear impression that Johnson had been charged with attempted murder and burglary and no such charges were in fact pending at the time that he appeared at his bond hearing." *See* Findings at 27.[7]

In her Answer Brief, Judge Kinsey admits that "no one disagrees with prohibiting knowing[ly] intentional misrepresentations." *See* Answer Brief at 22. She "concedes," for instance, that had she "falsely accused the incumbent of beating his wife, accepting bribes, or being convicted of DUI, she should be disciplined." *See* Answer Brief at 22. As evidence of Respondent's lack of genuine remorse, however, she then argues that the prohibition against knowing misrepresentations should only "be used to discipline candidates who engage in intentional, malicious, and substantial misrepresentations to gain [an] unfair advantage over opponents." *Id*.

Without even following this argument to its logical extreme, its absurdity is apparent at first blush. Such a test would simply encourage candidates to skate as

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[7] This charge is discussed in further detail in the JQC's Reply pp. at 25-30 and the Supplemental Brief at 19-21. *See also* Tab 7 to the JQC's Supplemental Brief.

close to the edge as possible and then do exactly as Judge Kinsey has done here; namely, dismiss their inartful choice of words as simply "semantics susceptible to more than one interpretation." *Id.* Such an approach was long ago condemned by one court when confronted with a similar argument:

> We have sufficiently reviewed the circular . . . . The argument that it is not libelous or is not untruthful depends upon the mistaken view that it cannot be condemned if skilled dialecticians can point out how each sentence or half sentence, standing alone, is not necessarily inconsistent with the facts. It is impossible to consider such a publication from that standpoint. It was drafted by Mr. Thatcher and his associates, skilled in the nice use of language and in the leaving of pegs whereon they might hang technical justifications; *it was prepared and published to be read by and to influence a class of the community not skilled in those things, and which would take it to mean what it seemed to mean; and it must be read against its composers with the same meaning which they intended its readers should draw.*

Thatcher v. United States, 212 F. 801, 810 (6th Cir. 1914) (emphasis added); *see also In the Matter of Bybee*, 716 N.E. 2d 957, 962-63 (Ind. 1999). No less standard should apply to Respondent's choice of language here.

III. THE *WHITE* DECISION HAS NO BEARING ON THE HEARING PANEL'S FINDINGS THAT JUDGE KINSEY IMPROPERLY MADE PUBLIC COMMENTS REGARDING TWO PENDING CRIMINAL MATTERS

In Charge No. 10 of the Formal Charges, the JQC alleged that in a brochure entitled, *A VITAL MESSAGE FROM LAW ENFORCEMENT*, Respondent discussed the facts of two pending criminal cases (defendants Alsdorf and Johnson) as part of her efforts to criticize the incumbent's handling of those matters, in violation of Canon 3(B)(9). Respondent admitted that at the time this brochure was published, neither Alsdorf nor Johnson had been tried for the crimes she publicized in the brochure. (T:1-99).[8]

The Hearing Panel found that "the comments regarding defendants Stephen Johnson and Gerard Alsdorf should have been reasonably expected to affect the outcome of their future cases," not merely that there was a possibility that those comments could affect the outcome of those proceedings. *See* Findings at 28. Other than a naked assertion that "the *White* decision obviously affects this charge as it is now clear all restrictions on candidates' speech must pass the strict scrutiny test," Respondent makes absolutely no showing of how *White* implicates any aspect of Canon 3(B)(9). *See* Answer Brief at 14-15.

Respondent proceeds to rehash two arguments which were made in her initial Response to the Court's Order to Show Cause. First, she intimates that Canon 3

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[8] The brochure is described in greater detail in the JQC's Reply and Supplemental Brief. *See* JQC Reply at 24-30 and Supplemental Brief 19-21. *See also* Tab 7 to the JQC's Supplemental Brief.

applies only to incumbent judges and not to candidates for judicial office. *See* Answer Brief at 14, n.7. She also argues that the record is "devoid of evidence the information in [her] campaign brochures in any way affected or impaired the outcome of either case, or could reasonably have been expected to do so." *Id*. at 15. As discussed below, both of these arguments fail under even minimal scrutiny.

In *In re Davey*, 645 So. 2d 398 (Fla. 1994), also a case involving pre-judicial conduct, the respondent argued, similar to Judge Kinsey here, that the JQC's disciplinary authority does not extend to acts occurring before a judge actually assumes the bench. Rejecting such a narrow view of the constitutional provision creating the JQC, this court plainly held that ***"pre-judicial conduct may be used as a basis for removal or reprimand of a judge."*** *Id*. at 403 (emphasis added). Although this Court has not expressly addressed whether Canon 3 applies to attorney-candidates for judicial office, there is clearly no less public interest in prohibiting attorney-candidates, as opposed to incumbent judges, from making public comments regarding pending cases.[9] If Respondent's position relative to Canon 3(B)(9) were

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[9] With respect to the applicability of Canons 3(B)(5) and (9), the commentary to Canon 7(A)(3)(d) is instructive. This particular commentary states that:

> Section 7(A)(3)(d) prohibits a candidate for judicial office from making statements that appear to commit the candidate regarding cases, controversies or issues likely to

accepted, attorney-candidates would be at liberty to make public comments which might affect the outcome of cases while incumbent judges would not. Aside from the vast confusion such a rule would cause to the electorate, there is no public interest in creating one set of rules which restricts incumbents and another set of rules which permits lawyers to violate the canons with impunity.[10]

Lastly, citing *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991), Respondent argues that "even if the information [in her campaign brochure] might possibly have affected the outcome, the statements in [her] brochure were constitutionally permissible." *See* Answer Brief at 15. Such arguments have been specifically considered and rejected by cases such as *Broadman v. Commission on Judicial Performance*, 18 Cal. 4th 1079, 959 P.2d 715, 77 Cal. Rep. 2d 408 (1998), *cert. denied*, 525 U.S. 1070, 142 L. Ed. 2d 662 (1999). These cases uphold

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> come before the Court. As a corollary, a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views. See also Section 3B(9), the general rule on public comment by judges.

[10] Respondent's argument that discipline should not be imposed since no actual harm occurred in the *Johnson* and *Alsdorf* is not persuasive. As this Court cautioned in *In re LaMotte*, 341 So. 2d 513 (Fla. 1977), "if a judge commits a grievous wrong which should erode confidence in the judiciary, but it does not appear that the public has lost confidence in the judiciary, the judge should nevertheless be removed." *Id.* at 518.

reasonable limitations on judicial speech relating to pending cases because such limitations further a substantial governmental interest unrelated to the suppression of expression.[11]

CONCLUSION

Respondent's method of campaigning, which parallels the same type of campaigning which this Court condemned in *McMillan*, was designed to have but one effect: "send a clear message that should [she] become a judge, [she] would be partial to law enforcement and the State." *McMillan*, 797 So. 2d at 566. Now that Respondent has reaped the benefit of the office she sought to obtain, she should not be permitted to distance herself from the pledges she made under the guise that she was simply trying to provide voters with necessary information on relevant issues. Additionally, *White* does not impact the Hearing Panel's findings as to Charges 7 and 9, which relate to misleading campaign statements, or as to Charge 10 relating to Respondent's comments regarding pending cases. Accordingly, the Hearing Panel's Findings should be affirmed.

[signatures to appear on following page]

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[11] Respondent's insistence that she has a constitutional right to comment on pending cases also seems to run counter to the rationale underlying Justice Scalia's opinion in *White* that campaign speech that relates to general statements of philosophy is protected; whereas, speech which evinces a demonstrated bias for or against particular parties is not so protected.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **SUPPLEMENTAL REPLY BRIEF** has been furnished by U.S. Mail to **BROOKE S. KENNERLY,** Executive Director, Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, FL 32303; **THOMAS C. MacDONALD, JR., ESQ.**, General Counsel, 100 N. Tampa Street, Suite 2100, Tampa, FL 33602; **JOHN**

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_____

Attorney

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this brief has been prepared in Times New Roman 14-point font and that such font size complies with the requirements of Fla. R. Civ. P. 9.210(a)(2).

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